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No. 91-1158

Supreme Court, U.S.  
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In The  
**Supreme Court of the United States**  
October Term, 1991

THE STATE OF MISSISSIPPI, ET AL.,

*Petitioners,*

v.

THE STATE OF LOUISIANA, ET AL.,

*Respondents.*

Petition For Writ Of Certiorari To The United States  
Court Of Appeals For The Fifth Circuit

**BRIEF IN OPPOSITION BY THE  
STATE OF LOUISIANA AND THE LAKE  
PROVIDENCE PORT COMMISSION**

RICHARD P. IEYOUNG  
Attorney General  
State of Louisiana

E. KAY KIRKPATRICK  
Assistant Attorney General  
State of Louisiana

GARY L. KEYSER  
Assistant Attorney General  
State of Louisiana  
Post Office Box 94095  
Baton Rouge, Louisiana  
70804-9095

PH: 504-342-7099  
FAX: 504-342-7901

*Counsel for Respondents*

79-1/10

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 STATE OF LOUISIANA AND THE LAKE  
 PROVIDENCE PORT COMMISSION

I.

PRELIMINARY STATEMENT

Petitioners correctly state that Louisiana sought to have this Court assume original jurisdiction under Article III, Section 2, of the United States Constitution and 28 U.S.C. Section 1251(a) (1988). *Louisiana v. Mississippi*, No. 114, October Term 1988. The motion of Louisiana for leave to file a bill of complaint was denied and Louisiana later filed a motion for rehearing and alternative motion to file a separate complaint, which were also denied by this Court.

Since that time, the case has been completely tried in a bifurcated trial in the district court in two separate trial fixings, with the trial court rendering two separate bench opinions and two separate judgments, all of which is contained in the appendix to the petition for writ of certiorari.

Thereafter, the Fifth Circuit reversed and rendered, entering judgment in favor of respondents herein. Petitioners filed a petition for rehearing and a suggestion for rehearing en banc, both of which were denied.

Petitioners have advanced every possible factual and legal argument in the courts below, changing the theory of their case in the petition for rehearing and suggestion for rehearing en banc before the Fifth Circuit. Petitioners continue with this new theory of the case before this Court, but it is insupportable in fact and in law.

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## II.

### STATEMENT OF THE CASE

The Statement of the Case of petitioners is generally correct, with the exception that the reference to "an island located in the Mississippi River" is not a completely accurate description of the land area claimed by petitioners.<sup>1</sup> In truth and in fact, petitioners are claiming the

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<sup>1</sup> At pages 2, 3, 4, 5, 6, 7, 8 and 16, the petition for writ of certiorari refers to "an Island", "Stack island" or "Island No. 94". At pages 17 and 18, the disputed accretion is more properly referred to as "the land".

accretion along the west bank of the river at Lake Providence, Louisiana, as will appear from Exhibit A to respondent's Motion to File Complaint, No. 114, Original, that exhibit being petitioners' Complaint Remove To Cloud filed in the district court. Attached to the Complaint To Remove Cloud is a map exhibit which depicts the boundary claimed in paragraph 52 of the complaint, the greater portion of which boundary is drawn essentially along the Louisiana levee, separating the levee from accretion which formed against that westerly bank. The full linear extent of the boundary proposed by petitioners is quite extensive and traverses the river from east to west above the vicinity of Lake Providence to miles below that reach of the river, generally dividing the Louisiana bank and accretions by an artificial boundary drawn by petitioners' "expert".<sup>2</sup>

The effort of petitioners from the outset has been to suggest that Island No. 94 continues in existence at the same geographic location as it was when first numbered by the Mississippi River Commission. Actually, the formation known as Island No. 94, 117.96 Acres at the time of patent, was numbered long prior to the sovereignty of either Mississippi or Louisiana; disappeared by erosion and was not in existence at the time of sovereignty of either state; did not re-form again until later years; periodically appeared, disappeared and re-appeared in

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<sup>2</sup> The testimony of this expert was rejected by this court in *Louisiana v. Mississippi*, 466 U.S. 96, 80 L.Ed.2d 74, 104 S.Ct. 1645 (1984), as well as by the U. S. Fifth Circuit in the case below, *Houston v. Thomas*, 937 F.2d 247 (5th Cir. 1991), at pages 8a and 11a of petitioners' appendix in this case.



differing locations and in various forms, such as bank accretion, sand bars and actual island formations; did not re-form until 1881 and was not patented out the United States until 1888, long after sovereignty of either state. Thus, its location with respect to the boundary is not relevant until the time of its formation and patent in 1888, as properly found by the court below. These facts are indisputable and are clearly shown by the exhibits in the voluminous record below.

It is to be noted that the Fifth Circuit decision commences with the recitation that:

In a boundary dispute as treacherous as old man river itself, the appellants challenge the district court's conclusion that accretions to the west bank of the Mississippi River are within the territorial boundaries of Mississippi.<sup>3</sup>

It is submitted that the lower court fully grasped the significance of petitioners' trial strategy, realizing that there were actually two separate geographic locations at issue, each known as the "island" or "Stack Island":

(1) The accretion to the west bank of the river at Lake Providence has sometimes been referred to as "the island" or "Stack Island", as it appears to be an island at extremely high water; and

(2) The "new" island which has developed at the precise geographic location of original Island No. 94 is known as "Stack Island".

<sup>3</sup> *Houston v. Thomas*, *supra*, at 249.

By describing a boundary generally along the Louisiana levee on the west bank of the river, petitioners would be able to capture ownership of both the accretion to the west bank and the new and extremely large island located in the river itself. The accretion to the west bank has been assimilated into the land mass along the west bank, and was so found even by the district court. In its Bench Opinion of June 23, 1989, the court found that this accretion to the "Louisiana shore" is "for large portions of the year completely dry between what is called the island and what is called the high bank on the Louisiana side",<sup>4</sup> making it a part of the bank.

Petitioners have been claiming possession, jurisdiction, and sovereignty of both the land accreted to Louisiana and to the "new" Stack Island near Mississippi. Hence, the Fifth Circuit characterization of the boundary dispute as "treacherous".

In the district court and the Fifth Circuit, petitioners have claimed that two avulsions occurred in the Mississippi River in the vicinity of Lake Providence, but failed at trial to present testimony or evidence of either. The Lake Providence Reach of the river is straight in its alignment, making an avulsion extremely unlikely without the intervention of man-made works, such as the 1881-1882 Mississippi River Commission dike project which Louisiana clearly established from U.S. Government documents.

Following is a description of the two avulsions claimed by plaintiffs:

<sup>4</sup> Pet. App. 19a, at 33a-34a

- (1) The enlargement of the east chute channel at Stack Island to the North between 1908 and 1913 is one claimed avulsion; and
- (2) The second avulsion is claimed to have occurred on the westerly shore below Lake Providence between the years 1913 and 1954, as set forth in paragraphs 56 through 58 of the Complaint To Remove Cloud.

Proof of both claimed avulsions is necessary to support the boundary claimed by plaintiffs. Plaintiffs failed to show and Louisiana has clearly refuted the claimed avulsions and shown the proposed boundary to be in error.<sup>5</sup> Petitioners' expert was unable to support the claimed avulsions with either testimony or documentary evidence.

In the petition for rehearing filed at the Fifth Circuit, petitioners abandoned the unsupported multiple avulsion claims and postulated a new theory concerning the proper location of the interstate boundary with respect to Stack Island, contending that the lower court erred in assuming that 1881 was the critical date, without specifying exactly what date was supposed to be controlling under the circumstances, except to say that "the boundary . . . must be determined . . . at a much earlier time."<sup>6</sup> The petition for rehearing never states the dates of sovereignty of the states or when or where Stack Island was formed on the purported "critical date."

<sup>5</sup> See Reply Brief of State of Louisiana and Lake Providence Port Commission, App 33a; *Houston v. Thomas*, *supra*.

<sup>6</sup> See Petition for Rehearing, page 6; App. 15a.

Petitioners' make factual arguments which have been urged in the lower courts, but which have no merit because they are not based upon facts in the record. It is suggested that the Fifth Circuit committed fundamental error in the application of both the Thalweg Rule and the Doctrine of Acquiescence.

These arguments and the various map exhibits upon which petitioners might seek to rely are addressed in the answer of the State of Louisiana and the Lake Providence Port Commission to the petition for rehearing. Petitioners did not attempt to argue for earlier periods of time prior to 1881, as the "relevant time" until after the decision of the Fifth Circuit.<sup>7</sup> There is no evidence in the record or otherwise which would support the new theory of the case that "the boundary . . . must be determined . . . at a much earlier time." There is simply no evidence to support any such contention.

Petitioners argue with the decision of the Fifth Circuit and the authorities upon which it is based, contending that it should have looked at earlier periods of time for its determination. As pointed out above, pages 3 and 4, Stack Island was not in existence at the time of sovereignty of either state, although an Island No. 94 was identified sometime prior thereto and later disappeared. Following the time of statehood, formations known as Island No. 94 periodically appeared and disappeared from time to time in differing locations and were shown on various sketches of maps made during reconnaissance

<sup>7</sup> See Answer of the State of Louisiana and the Lake Providence Port Commission to the Petition for Rehearing, App. 1a.

trips down the Mississippi, and on some surveys, but not east of the main channel as an actual island.

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III.

APPLICABLE LAW

At the outset of the litigation in the U. S. District Court for the Southern District of Mississippi, counsel for respondents were gravely concerned that there might not be total adherence to applicable principles of law. A review of the Bench Opinions of the district court contained in petitioners' appendix will show that while cases were cited by the district court, the applicable principles of law for which those cases stand were not followed. The Fifth Circuit correctly followed applicable principles of law and applied them to the facts of this case.

It is suggested at page 7 of the petition for writ of certiorari that the Fifth Circuit committed fundamental error in application of the Thalweg Rule by addressing only evidence from 1881 forward. It is stated that "If Stack Island was east of the boundary channel . . . or . . . if Stack Island was formed thereafter east of the boundary channel, Stack island is a part of Mississippi". (emphasis ours) This language is nothing but misleading innuendo.

As pointed out above, Island No. 94 or Stack Island, as it was sometimes called, disappeared and re-appeared from time to time in various forms and locations, sometimes being nothing more than a low water elevation or sand bar connected to the bank. Any map exhibit which would locate the island in any particular place at any moment in time would not be relevant when the island

later washed away and re-formed in a later period of time, which it did repeatedly. The most relevant and definitive exhibits were those recognized by the Fifth Circuit, particularly, the Mississippi River Commission study complete with hydrographic surveys completed in December of 1881 pursuant to the Congressionally-funded improvement plan for this reach of the river.<sup>8</sup> There is no contrary evidence in the record of this case or otherwise and the lower court was imminently correct in relying upon this government study.

The court was equally correct in relying upon *Iowa v. Illinois*, 147 U.S. 1, 13 S.Ct. 237, 37 L.Ed. 55 (1893); and *Louisiana v. Mississippi*, 466 U.S. 96, 104 S.Ct. 1645, 80 L.Ed.2d (1984). Simply put, current law dictates that the ordinary downstream course of traffic on the river defines the live thalweg and the thalweg defines the boundary.

Petitioners again use misleading language at page 8 of the Petition for Writ of Certiorari, to wit:

If Stack Island existed at the time of the admission of Louisiana or Mississippi to the Union or prior to 1881, which is clear from the evidence, is undisputed, and is assumed for purposes of the Fifth Circuit's decision, the location of the thalweg in 1881 is irrelevant.

As shown at page 4 of respondents' Answer to the Petition for Rehearing at the Fifth Circuit,<sup>9</sup> Stack Island disappeared during the great earthquake of 1812, prior to

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<sup>8</sup> *Houston v. Thomas*, *supra*, 937 F.2d 247, at 251.

<sup>9</sup> App. 1a.



the time of Louisiana's admission later that same year, re-appearing years later, only to be washed away again and re-formed in another location.

Consequently, for petitioners to argue "if Stack Island existed, then the Fifth Circuit decision is in error", is misleading, because there is no evidence in the record to support this contention. Surely, if there were, petitioners would have relied upon it and there would have been no need for respondents to have brought to the court's attention the fact that there was no such evidence, as briefed in respondents' answer to the petition for rehearing in the Fifth Circuit.

On the question of the Doctrine of Acquiescence, petitioners simply restate old arguments, improperly drawn conclusions and unsupported advocacy, just as they have done with the Doctrine of Thalweg. Moreover, petitioners recite various acts indicating acquiescence, each of which was dealt with specifically by the court below, including hunting and fishing by Louisiana residents on the accretion; enforcement of Louisiana wildlife laws on the accretion; and payment of Louisiana taxes on the disputed accretionary lands by Louisiana residents.<sup>10</sup>

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<sup>10</sup> *Houston v. Thomas, supra*, at 253.

#### IV.

#### CONCLUSION

Petitioners state no valid grounds for this court to issue its writ of certiorari in this case. As pointed out above, petitioners conjecture for facts which do not exist and argue that the cited legal principles should be applied to the facts for which they conjecture.

These factual arguments and legal concepts have been considered and quite properly rejected by the court below. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD P. LEYDOR  
Attorney General  
State of Louisiana

E. KAY KIRKPATRICK  
Assistant Attorney General  
State of Louisiana

GARY L. KEYSER  
Assistant Attorney General  
State of Louisiana

Post Office Box 94095  
Baton Rouge, Louisiana  
70804-9095

PH: 504-342-7099

FAX: 504-342-7901

*Counsel for Respondents*



## APPENDIX

1a

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 90-1031

---

JULIA DONELSON HOUSTON, ET AL.  
Plaintiff-Appellees

versus

RUTH M. THOMAS, ET AL  
Defendants

---

ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE SOUTHERN DISTRICT  
OF MISSISSIPPI WESTERN DIVISION,  
NO. 86-0080(B)

---

ANSWER OF THE STATE OF LOUISIANA AND  
THE LAKE PROVIDENCE PORT COMMISSION,  
INTERVENORS-APPELLANTS, TO PETITION  
FOR REHEARING OF PLAINTIFFS-APPELLEES

---

WILLIAM J. GUSTE, JR.  
Attorney General  
State of Louisiana

GARY L. KEYSER  
Assistant Attorney General  
Post Office Box 94095  
Baton Rouge, LA 70804-9095

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I. INTRODUCTION

Once again, Appellees plow over exhibits offered in the trial before the U.S. District Court for the Southern District of Mississippi and subsequently considered by this Court on appeal, but offer nothing new. The Petition for Rehearing restates old arguments, improperly drawn conclusions and unsupported advocacy. The facts and applicable law simply do not support the claim of Plaintiffs. The Petition for Rehearing continues to argue theories of law and concepts previously rejected by this Court. It also clings to phrases such as "land in place";

"boundary channel"; and erroneous concepts such as "a chute channel can never be a boundary channel", which has no foundation in fact, science, or law.

Interestingly, Appellees apparently now abandon the unsupported multiple avulsion claims of their expert, Austin Smith, and postulate a new theory concerning the location of the interstate boundary with respect to Stack Island, contending that the Court erred in assuming that 1881 was the critical date. At page 6, it is stated, in part, that "the boundary . . . must be determined . . . at a much earlier time." Later, at page 7, it is contended that the Court must determine where Stack Island was located at the time Louisiana became a state (1812) or where it was formed thereafter "at the critical time." The Petition for Rehearing never states the dates of sovereignty of the states or when or where Stack Island was formed on the purported "critical date."

Counsel for Appellees forgets that the formation known as Island No. 94 or Stack Island was not in existence at the time of sovereignty of either state, did not form until later, periodically disappeared and reappeared in differing locations in various forms, such as bank accretion, sand bars, and actual island formations, and was not patented out of the United States until 1888. Thus, its location with respect to the boundary is not relevant until the time of patent, as properly found by this Court. Basically, Appellees would like to pick a date for a boundary determination more favorable than the patent period of 1881-1888, but were not able to specifically state or support a specific date or period of time.

Appellees dispute and continue to argue the holding of this Court concerning the rule of thalweg, the doctrine of acquiescence, the doctrine of adverse possession and factual findings concerning the payment of property taxes and acts of sovereignty.

The Petition for Rehearing constitutes more of an argument with the decision of this Court rather than any sound basis for the granting of a rehearing so that all of these points may be re-argued. It is submitted that a rehearing of this case would be tedious, time-consuming, costly in terms of the energy and labor of the Court required, and pointless. Appellees state no grounds for a re-hearing; they seek only to re-hash previously rejected arguments and the newly-proposed sovereignty theory for which there is absolutely no factual or legal basis.

## II. COMMENT ON APPELLEES' STATEMENT OF FACTS

As stated in the Introduction, Appellees would like to draw the Court's attention to an earlier period of time during which Stack Island might have been east of the legal thalweg in order to make the claim that "once Stack Island is east of the legal thalweg it is land in place and always in Mississippi."

Most of the Petition for Rehearing is devoted to discussing exhibits previously considered by the Court and rejected, and arguing that the Court's analysis is in error and that it failed to understand the cases which it

cited, such as *Missouri v. Kentucky*<sup>1</sup> and *Hogue v. Stricker Land and Timber Co.*<sup>2</sup>, at page 7. Without attempting to discuss Appellees' arguments on each of the exhibits, following is a brief discussion of a few of the exhibits to show that their use in support of a rehearing is utterly without foundation.

In Appellees' "Statement of Facts Necessary To The Argument of The Issues", it is stated that P-1, the 1826-27 U.S. Survey, is the earliest evidence *in the record* showing the location of Stack Island (emphasis ours). This is true, because Appellees did not introduce more relevant maps closer to the time of Louisiana's sovereignty in 1812; such maps would show that Island No. 94 was not in existence at that time. As will be shown at page 5 et seq. below, this map and the others cited by Appellees are not relevant under any theory and do not support the new "time of sovereignty" theory suggested in the Petition For Rehearing.

A more relevant map Appellees might have used would be the 1821 "Map of Reconnaissance of Mississippi River", by Captain H. Young and Captain W.T. Poussin, made of this reach of the river, which clearly shows no Island No. 94 at that time. Sand bars are, however, shown on Louisiana's side of the navigation channel between Islands 93 and 95. See Item 1 in the Appendix.

<sup>1</sup> *Missouri v. Kentucky*, 11 Wall. 395, 78 U.S. 395, 20 L.Ed. 116 (1871)

<sup>2</sup> *Hogue v. Stricker Land & Timber Co.*, 69 F.2d 167 (5th Cir. 1934)



Counsel for Appellees might also have selected the 1818 edition of "The Navigator", very near the year of Louisiana's admission into the Union. Island No. 94 did not exist at that time, having been washed away in 1812 by an enormous earthquake or by floods.<sup>3</sup> It is quite clear that the island has been "sunk by the earthquake [1812] or swept off by the floods", including the bar which had existed below it. See Item 3 in the Appendix, describing the *disappearance of Island No. 94*.

Mississippi was not admitted into the Union until 1817, being a Territory prior to that time. If the critical date for the location of Stack Island in Mississippi relates to the time of state sovereignty, it would relate to the sovereignty of Mississippi and not Louisiana. Since Stack Island was not in existence at that time, the date of Mississippi's sovereignty would not be relevant. At page 7 of the Petition for Rehearing, counsel for Appellees argues that "where Stack Island was located at the critical time" is decisive. However, counsel never identifies the "critical time".

Consequently, Appellee's argument fails if it is intended to suggest that at the time of Louisiana's sovereignty, Stack Island was surveyed as being within the territory of Mississippi or that it was in Mississippi at the time of its sovereignty. In fact and in law, Island No. 94 did not exist at that time. After its formation in later years, its ownership was in the U.S. government and it

<sup>3</sup> See *Lloyd's Steamboat Directory, and Disasters On The Western Waters*, documenting the great earthquake of 1812 and floods, attached as Item 2 in the Appendix.

was not patented out until 1888. Consequently, its location at the time of patent is the relevant time frame.

Appellees argue that the 1826-1827 U.S. Survey is important and that it shows Stack Island east of the boundary channel. In fact, this government Township Plat was made for *land patent purposes*, does not purport to be a survey of the river, and shows only a *sketched-in* river as the western boundary of the Choctaw Land District (Mississippi). Contrary to Appellees' assertion, no boundary channel is shown. This land district survey does not purport to be a river survey or hydrologic survey in any regard.

Appellees argue that the 1828-29 U.S. Survey clearly shows "no island" on the Louisiana side of the channel. Actually, as in the case of the 1826-1827 Township Plat, the river is only *sketched in* as the eastern boundary of the Land District North of the Red River (Louisiana) and is not a survey of the river at all. No sand bars or islands are shown in this reach of the river.

Appellees argue that the 1867 Meriweather map shows the island located in Mississippi, but that time period is not relevant under Appellees' own theory that the time of Louisiana's sovereignty is "the critical time." Quite importantly, what is argued to be Stack Island in 1867 is merely accretion to the bank and not an island formation at all.

Appellees argue that the 1874 reconnaissance map of Major Suter is important and that it shows Island No. 94 as "land in place", whatever this may mean. Counsel for appellees may not be aware that the Suter survey was merely a "reconnaissance survey" made from the Pilot

House of the boat on which Major Suter was riding downstream, and does not purport to be an accurate survey at all, but, again, only a sketch for the purpose of estimating the costs of improving certain routes along the river.<sup>4</sup> At that time, as in 1867, the formation previously known as Island No. 94 had become a *low water elevation sand bar* attached as accretion to the bank. It was no longer an island at all and did not show at high water.<sup>5</sup> The 1879 Suter map is nearly identical, showing the sandy accretion attached to the bank in the 1874 survey to be separated at low water by a chute channel. By 1881, the intervening years of river action had caused the chute channel to develop to such an extent as to carry the main

<sup>4</sup> The Report of Major Charles R. Suter, Corps of Engineers, dated February 18, 1875, issued from the Engineer Office, United States Army, reporting to Congress concerning its appropriation of \$200,000 for surveys and estimates for the improvement of certain routes recommended by the Senate Select Committee on Transportation Routes to the Seaboard advises that "An engineering party was placed on one of the Government steamers and sent into the field, with instructions to sketch the river carefully from pilot-house of the steamer . . . ." It also states that "Although the information obtained by this reconnaissance is not sufficiently detailed or extensive to allow estimates of the cost of the improvement recommended to be made, yet it will, I hope, be sufficient to point out the nature of the improvement required, and the means by which it can be effected." at page 496.

<sup>5</sup> Reconnaissance Surveys were conducted during the low water months of the year, October, November, December, so as to describe the conditions of the river at the most difficult times for navigation. At high water, many sandbars, shoals and other conditions revealed at low water stages would be obscured by high water and not of significance to vessels on the river, as in the case of Island No. 94.

navigation channel of the river. In fact, as detailed by the Mississippi River Commission's report discussed in the decision of the Court in this case, the river was eroding the bank to such an extent as to threaten to scour away significant land areas, giving rise to the need for dike works to divert the river out of the east channel and away from the bank.

As correctly described by the Court in its opinion of August 5, 1991:

"Thus, the boundary remained frozen in the east channel, where it lay at the time of the patent in 1881, regardless of the nature of any shift in the river's course. Hogue, 69 F.2d at 168.

None of the maps argued by Appellees are in a relevant time period and none support Appellees' new sovereignty theory.

### III. COMMENT ON APPELLEE'S LEGAL ANALYSIS AND ARGUMENT

In paragraph II of the Petition For Rehearing, Appellees argue that this Court has misapprehended the law of the rule of the thalweg and the island rule, clearly stating that the Court's analysis is in error and that it failed to understand the very cases which it cited in the support of its decision.

In paragraph III of the Petition for Rehearing, Appellees argue that Mississippi has jurisdiction over Stack Island under the doctrine of acquiescence pursuant to acts of dominion, control and sovereignty, and that Louisiana acquiesced in the exercise of these purported acts of

the State of Mississippi. All of these argument have been previously considered by this Court and rejected.

It is submitted that the Court followed applicable principles of law in its decision and cited the controlling authorities on the relevant issues. Accordingly, the arguments of Appellees for a rehearing should be rejected.

#### IV. CONCLUSION

Appellees state no grounds for a rehearing and seek only to re-hash previously rejected arguments and the newly-proposed sovereignty theory for which there is absolutely no factual or legal basis. Accordingly, the Petition For Rehearing should be denied.

Respectfully submitted,

THE STATE OF LOUISIANA  
AND THE LAKE PROVIDENCE  
COMMISSION

Intervenors-Appellants

WILLIAM J. GUSTE, JR.  
Attorney General

BY: /s/ Gary L. Keyser  
GARY L. KEYSER  
Assistant Attorney General  
Post Office Box 94095  
Baton Rouge, LA 70804-9095  
(504) 342-7900  
Bar Roll No. 7357

#### CERTIFICATE

I, Gary L. Keyser, attorney of record for the Intervenors/Appellants, hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to the following:

Robert R. Bailess  
8th Floor, First National Bank Bldg.  
Post Office Box 991  
Vicksburg, Mississippi 39181

Robert E. Sanders  
Assistant Attorney General  
State of Mississippi  
Post Office Box 220  
Jackson, Mississippi 39205

This 15th day of October, 1991.

/s/ Gary L. Keyser  
GARY L. KEYSER  
Assistant Attorney General

#### APPENDIX

##### Item

1. Map of Reconnaissance of Mississippi River Made during October, November and December, 1821, by Capt. H. Young and Capt. W. T. Poussin
2. *Lloyd's Steamboat Directory, and Disasters On The Western Waters.*
3. *The Navigator*, 1818





MAP OF HAWAIIAN ISLANDS  
 Made during October, November and December, 1923.  
 By  
 CAPT. E. J. YOUNG, AND CAPT. E. S. ROBERTS  
 of the  
 GEOLOGICAL SURVEY  
 and  
 LIEUT. E. J. YOUNG, U.S. ARMY.  
 Under the direction of the Board of Engineers.  
 Scale of length 1 in. = 1 mile  
 Scale of breadth 1 in. = 1 mile





# THE NAVIGATOR,

CONTAINING

DIRECTIONS FOR NAVIGATING THE

MONONGAHELA, ALLEGHENY,  
OHIO, AND MISSISSIPPI RIVERS;

WITH AN AMPLE ACCOUNT

OF THESE MUCH ADMIRERD WATERS,

FROM THE HEAD OF THE FORMER  
TO THE MOUTH OF THE LATTER;

AND A CONCISE

DESCRIPTION OF THEIR TOWNS, VILLAGES,  
HARBORS, SETTLEMENTS, &c.

WITH MAPS OF THE OHIO AND MISSISSIPPI

TO WHICH IS ADDED

## AN APPENDIX,

CONTAINING

AN ACCOUNT OF LOUISIANA,

AND OF

THE MISSOURI AND COLUMBIA RIVERS,

AS DISCOVERED BY THE VOYAGE UNDER

CAPTS. LEWIS AND CLARK.

FIFTH EDITION.

PITTSBURGH,

PRINTED AND PUBLISHED BY CRAWFORD &amp; STEAR,

FRANKLIN ST. WOOD STREET.

1818.

THE NAVIGATOR,

### Nine Mile Reach,

Where you have a beautiful view of the river.

No. 94, Stack or Crow's nest island, 6 miles  
below 93.

Has been sunk by the earthquake or swept off by the floods; but just below where it stood, is a high sand bar, an acre with young willows, and is about the middle of the river. This bar may grow into another Crow's, but is not likely, as it is a sand bar. The river here runs hard against the head of the bar, and also against the right bank. A channel right side near to the island, thence draws towards the right land shore.

A creek empties in on the right side just above the two settlements. The Whirls heads run far from this place, on which is a considerable settlement, 40 miles distant, and to which from hence is a cut road. It is thirty miles to Mountbourn's settlement on that river.

Crow's nest is a small island very small and stood in about the middle of the Nine-mile Reach. A large bar had formed just below where the island stood, but it also has given way to the current, and is no more.

15a

90-1031

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 90-1031

---

JULIA DONELSON HOUSTON,  
THE STATE OF MISSISSIPPI, ET AL  
Plaintiffs/Appellees

V.

RUTH M. THOMAS, ET AL  
Defendants/Appellants

---

PETITION FOR REHEARING

---

STATE OF MISSISSIPPI  
BY: MIKE MOORE  
ATTORNEY GENERAL  
BY: ROBERT E. SANDERS  
Assistant Attorney General

ROBERT R. BAILESS  
8th Floor, First National  
Bank Bldg.  
Post Office Box 991  
Vicksburg, Mississippi 39181  
Telephone: 601-636-8451  
Attorney for Plaintiffs/Appellees

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## I.

## STATEMENT OF FACTS NECESSARY TO THE ARGUMENT OF THE ISSUES

The 1826-1827 United States survey of Township 11 North, Range 9 West, Issaquena County, Mississippi, Exhibit P-1, is the earliest evidence in the record showing the location of Stack Island. This map clearly shows that in 1826-1827 the island is east of the boundary channel, separated from the Mississippi mainland by a narrow chute and wholly within the jurisdiction of Mississippi.

The 1828-1829 United States survey of Township XXI, Range XIII East, of what is now East Carroll Parish, Louisiana, Exhibit P-2, clearly shows no island in the Mississippi River on the Louisiana side of the boundary channel.

Plaintiffs' Exhibit P-3, which is a map prepared by Meriwether in 1867, without question shows the island located in the jurisdiction of Mississippi. This exhibit shows a chute channel east of Stack Island that is sanded up and not navigable.

The next exhibit in the record in sequence of time is Exhibit P-4. This map, entitled "Reconnaissance of the Mississippi River in 1874", was made pursuant to an 1874 Act of the United States Congress by Major Suter for the United States Corp of Engineers. It clearly shows Stack Island (No. 94) is land in place in Mississippi. The chute channel east of the island is still sanded up. The navigation and boundary channel, as drawn on this map by Major Suter of the United States Corps of Engineers, is located west of Stack Island.

Exhibit P-5 is an 1879 map made by the same Major Suter. This map was made as the blueprint of the plan for the Mississippi River Commission to narrow the channel of the river. It is the drawing used by the MRC in its plans for the project referred to in the 1883 MRC Report. This survey distinctly shows that Stack Island, which is depicted on the map as Island 94, is land in place in Mississippi. There is only a narrow chute channel separating the island from the Mississippi mainland.

Exhibit P-7 is an August, 1881 survey of Public Lands made by the United States Deputy Surveyor pursuant to directions from the General Land Office of the United States. The survey by the U. S. Deputy Surveyor was required in order for public lands to be sold by the United States government pursuant to an 1820 Act of Congress entitled "An Act Making Further Provision for the Sale of Public Lands." This survey was required to patent Stack Island, Island No. 94, as Township 11 North, Range 9 West, Issaquena County, Mississippi. Stack Island is plainly shown as land in place in Mississippi. This survey definitely shows that the boundary channel was west of the island. The Deputy Surveyor's field notes for this survey are Exhibit P-6.

The next exhibit contained in the record in sequence of time is Exhibit P-8 which is Marshall's October-November, 1881 Shore Line survey. This map prepared by Lt. Marshall of the Corps of Engineers in October and November, 1881, as part of the MRC project, clearly shows Stack Island, No. 94, as land in place in Mississippi. The Government navigation lights, which are clearly shown on Exhibit P-8, track the main downstream navigation course downstream from the right bank at

Longwood Landing to the left bank government light between Baleshed Bar and Stack Island; thence west of Stack Island to the government light at All Right on the right bank. Both of the Louisiana expert witnesses declared that navigation lights are determinative of the main navigation course. See pages 674, 679 and 696 of the Transcript. The east chute of the river is obviously not the navigation channel as of October-November, 1881. The chute is certainly not the boundary channel.

The next sequential exhibit is Exhibit P-13. These maps of the topography and hydrography of the Mississippi River were surveys prepared no earlier than October of 1882. Stack Island is a salient feature on these maps. The chute channel was enlarging in the 1882 flood. The boundary channel remained west of Stack Island.

The object of the Mississippi River Commission project during 1882-1883 was to *bring the main channel of the river back* to the west of Stack Island, where the main channel had been located prior to 1882.

Since 1882, Stack Island has remained as land in place and it has not disappeared. See Exhibits P-37-A, P-37-A.1, P-37-B, P-37-B.1. These exhibits are tracings taken from MRC of Corps maps recording the loci of Stack Island during the years of 1882, 1894, 1908, 1913, 1925, 1930 and 1937. Exhibits P-27, P-28, P-29 and P-30 are aerial photographs of the United States Corps of Engineers during the years 1932, 1938, 1941 and 1955.

The United States surveyed Stack Island, Mississippi as public land in 1881 and granted a patent to Stephen B. Blackwell in 1888, which patent related back to the 1881 survey. Exhibit P-41. Louisiana did nothing to contest this

United States patent or the 1881 patent survey for over 100 years.

Mississippi has assessed and collected taxes on Stack Island at least since 1889. Exhibit P-64. Louisiana offered no proof that it assessed or collected any taxes on the disputed lands. Instead, Louisiana only offered proof concerning taxes on the Louisiana mainland. (See Transcript at pages 827-832)

The State Courts of Mississippi have taken jurisdiction over Stack Island in 1937 and again in 1968. Exhibits P-53 and P-58. The United States District Court for the Southern District of Mississippi took jurisdiction over the island in a case that began in 1972. *Houston v. U.S. Gypsum*, 569 F.2d 880 (5th Cir. 1978). Louisiana offered no proof of any of its courts taking jurisdiction over Stack Island.

Mississippi offered proof of acts and recognition of individuals in the area that supported that Stack Island is located in Mississippi. For testimony of witnesses, see pages 46, 81, 97, 137-138, 144-146, 226-229, 242-243, 250 and 252 of the Transcript. Also see Exhibits P-40 through P-65. Louisiana offered untimely proof of recent origin that did not prove anything with regard to the issue of acquiescence. Louisiana offered no proof of deed transfers or other conveyances of Stack Island.

The State of Mississippi granted the disputed lands to Mrs. Stephen B. Blackwell on June 1, 1933 after Stack Island had been sold for taxes and forfeited to the State of Mississippi. Exhibit P-46. Louisiana offered no proof of grants from the State of Louisiana concerning the disputed lands.

No later than 1881, Stephen B. Blackwell was homesteading Stack Island as Mississippi lands. Exhibit P-40. There is no evidence of Louisiana residents residing on Stack Island and there is no evidence of Louisiana residents claiming possession of Stack Island. The Houston interests have owned Stack Island since 1934. Exhibit P-47. A decision by this Court that Stack Island is in Louisiana will deprive the plaintiffs of ownership of the island. See Article 512 of the Louisiana Civil Code.

The State of Louisiana and the Lake Providence Port Commission did not claim Stack Island until 1987 – after the Plaintiffs filed their suit to quiet title. See Exhibit P-82, P-91, P-98, P-112 and Louisiana Exhibit LA-37-A.3 and LA-37-A.1. The Board of Commissioners of the Fifth Louisiana Levee District acknowledged that any islands claimed by Louisiana under the Acts of 1886 and 1908 had disappeared. Exhibits P-102 and P-108. In 1907 Louisiana surveyed all islands belonging to the State of Louisiana. See Exhibits LA-37-A.1 and LA-37-A.3. This survey and the Louisiana case of *State ex rel Board of Commissioners for Fifth Louisiana Levee District v. Capdevielle, State Auditor*, 54 So. 820 (La. 1911) conclusively shows that the State of Louisiana did not own or claim jurisdiction over Stack Island.

## II.

THIS COURT HAS MISAPPREHENDED THE LAW OF THE RULE OF THE THALWEG AND THE ISLAND RULE

### A.

THE FIRST STEP OF THE COURT'S ANALYSIS IS IN ERROR

This Court states, at page 5131 of the August 5, 1991 Opinion, that it would apply a two-step analysis in

resolving this case. This Court said: "First, we determine which channel constituted the boundary thalweg in 1881." The Court erred in assuming that 1881 was the critical date for this determination. Under clearly established law, the boundary with respect to the island must be determined by the location of the thalweg at a much earlier time. The court erroneously assumed that the *navigation thalweg* in 1881 constituted the *boundary thalweg*. The Court has failed to consider the proper criteria in its determination of the boundary thalweg.

It is obvious from a study of the August 5 Opinion that what this Court actually did was to attempt to determine the location of the *navigation channel* as it existed in 1881-1882. The navigation channel may change, but such changes will not affect the boundary channel around an island.

In order to determine the boundary channel, this Court must follow the law established by *Missouri v. Kentucky*, 11 Wall. 395, 78 U.S. 395, 20 L.Ed. 116 at 118-119 (1871).

"The boundaries of Missouri, when she was admitted into the Union as a State in 1820, were fixed on this basis, as were those of Arkansas in 1836, 3 Stat. at L., 545; 5 Stat. at L. p. 50. And Kentucky succeeded in 1792 (1 Stat. at L., 189) to the ancient right and possession of Virginia, which extended by virtue of these treaties to the middle of the bed of the Mississippi River.

"It follows, therefore, that if Wolf Island, in 1763, or in 1820, or at any intermediate period between these dates, was east of this line, the jurisdiction [sic] of Kentucky rightfully attached



to it. If the river has subsequently turned its course and now runs east of the island, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the States, and the island does not in consequence of this action of the water, change its owner."

Also, see *Hogue v. Stricker Land & Timber Co.*, 69 F.2d 167 (5th Cir. 1934); *Davis v. Anderson-Tully Company*, 252 F. 681 (8th Cir. 1918); *Commissioners, etc. v. United States*, 270 F. 110 at 113 and 114 (8th Cir. 1920).

In order to properly make its determination, this Court must determine where Stack Island was located at the time Louisiana became a state if it existed at that time, and if not, where it was formed thereafter. It is patently clear that this Court, in making its first determination, never considered any evidence dated prior to December, 1881 to determine where Stack Island was located at the critical time, and instead relied on (1) a November 15, 1883 MRC Report covering a period from December 1, 1882 through November 1, 1883, (2) an 1882 MRC Survey depicting the topography and hydrography of this portion of the river in 1882, and (3) some "hydrographic survey completed in December of 1881."

There is no evidence offered by Louisiana that is dated prior in time to 1882. This Court must, in its decision, accept as uncontroverted all evidence in the record dated prior to December, 1881. These exhibits are P-1, P-2, P-3, P-4, P-5, P-6, P-7 and P-8. An unbiased study of these exhibits mandates that the Court reach the conclusion that Stack Island, also referred to as Island No. 94,

was always located within the jurisdiction of the State of Mississippi. If the river subsequently turned its course, and now runs east of the island, the status of the island was not altered by this change, for the channel which the river abandoned remains, as before, the boundary between the States, and the island does not, in consequence of this action of the water, change its owner. *Missouri v. Kentucky*, supra, at 119, *Hogue v. Stricker Land & Timber Co.*, supra, at 167-168.

At all times in 1881 and at all times prior to 1881, the boundary channel was west of Stack Island. The very quote of the 1883 MRC Report relied upon by this Court at page 5132 of its Ruling in determining the location of the main channel, conclusively shows that the main channel of the river was located west of Stack Island prior to this 1883 Report. The Report clearly says, "The closing of the main channel of the river, which passed between the foot of Baleshed Bar and the head of Stack Island, and bringing it back to the right of Stack Island by a system of deflecting dikes . . . ." (emphasis added) If the main channel of the river had not been west of the island prior to the Report, there would be no logical reason for the use of the words "bringing it back" to the west side of Stack Island.

The Court also quotes the Report from page 425 on page 5132. The Report, in each instance referring to the channel east of Stack Island, refers to that channel as the *Stack Island Chute*. A chute channel can never be a boundary channel. The chute channel is the lesser channel of the river that is located wholly within the bordering state - in this case, in Mississippi. The bed of the chute channel is owned by the bordering state - in this, Mississippi.



## B.

LOUISIANA HAS ACKNOWLEDGED THAT STACK ISLAND WAS NOT FORMED IN LOUISIANA

Louisiana can only claim jurisdiction over the Island by two methods under the Rule of the Thalweg and the Island Rule:

1. If Stack Island was located in the bed of the river prior to Louisiana's admission as a State.

This obviously was not the case. The United States land survey must definitely placed Stack Island in Mississippi in 1826-1827. See Exhibit P-1. The United States land survey did not place Stack Island in Louisiana. See Exhibit P-2. Instead, the United States General Land Office surveyed Stack Island as Island No. 94 and as Mississippi lands. See Exhibits P-6 and P-7.

2. If Stack Island was formed in the bed of the river in Louisiana after Louisiana became a state.

Louisiana has acknowledged that this did not happen. This is abundantly clear by a studied review of the exhibits of the State of Louisiana.

Exhibit LA-37-A.1 is a Louisiana survey of islands claimed under the jurisdiction of Louisiana in 1907. This survey was performed by Louisiana state engineers in furtherance of Louisiana Act No. 44 of 1886 and Act No. 191 of 1908. The Acts and the claim of the State of Louisiana are clearly defined in the case of *State ex rel Board of Commissioners for Fifth Louisiana Levee District v. Capdevielle, State Auditor*, 54 So. 820 (La. 1911). This case is in the record as Exhibit LA-37-A.3.

Of course, it was clear to the State of Louisiana in 1886 when it passed Act No. 44, and in 1907 when it surveyed islands claimed by Louisiana, that Stack Island was lands that were surveyed into Mississippi in 1826-1827, the subject of an 1881 United States patent survey and the subject of the patent actually issuing [sic] by the United States of America to Stephen B. Blackwell in December, 1888 in accordance with the patent survey. Exhibits P-1, P-6, P-7 and P-41.

## III.

THE STATE OF MISSISSIPPI HAS JURISDICTION OVER STACK ISLAND UNDER THE DOCTRINE OF ACQUIESCENCE

Through a long line of cases, the United States Supreme Court has set down numerous criteria which have probative value in the determination of boundary lines between states under the Doctrine of Acquiescence. There are two general areas of proof. The first area is proof by a state of acts of dominion, control and sovereignty over land. The other area concerns the failure of a state to prove or assert any definite claim of right to the land or claim of jurisdiction over the land.

## A.

ACTS OF DOMINION, CONTROL AND SOVEREIGNTY BY THE STATE OF MISSISSIPPI

1. Township surveys prepared by the United States of America General Land Office. See *Indiana v. Kentucky*, 136 U.S. 479, 10 S.Ct. 1051, 34 L.Ed. 329 at 333-334 (1890),

*Louisiana v. Mississippi*, 202 U.S. 1, 50 L.Ed. 913 at 932 (1906).

2. Patents issued by the United States showing property to be in a particular state. See *Louisiana v. Mississippi*, supra, at 933 and *Arkansas v. Tennessee*, 60 S.Ct. 1026, 310 U.S. 563, 84 L.Ed. 1362 at 1365 (1940).

3. Assessment and payment of land taxes. See *Indiana v. Kentucky*, supra, at 335, *Virginia v. Tennessee*, 148 U.S. 503, 37 L.Ed. 537 at 545 (1933); *Louisiana v. Mississippi*, supra, at 933; *Maryland v. West Virginia*, 217 U.S. 1, 54 L.Ed. 645 at 657 (1910); *Vermont v. New Hampshire*, 289 U.S. 593, 77 L.Ed. 1392 at 1403 (1933); *Arkansas v. Tennessee*, supra, at 1365 (1940).

4. Court actions concerning the lands in which a state assumed jurisdiction over the lands. See *Indiana v. Kentucky*, supra, at 335.

5. Acts and recognition of the individuals in the area that tend to support in which state the lands are located. See *Indiana v. Kentucky*, supra at 336; *Virginia v. Tennessee*, supra, at 544-546; *Louisiana v. Mississippi*, supra, at 933; *Maryland v. West Virginia*, supra, at 657-660; *Vermont v. New Hampshire*, supra, at 1405; *Arkansas v. Tennessee*, supra, at 1365.

6. Grants by the state to individuals. See *Indiana v. Kentucky*, supra, at 335; *Louisiana v. Mississippi*, supra, at 932.

7. The effect of a ruling upon the rights of private persons. *Virginia v. Tennessee*, supra, at 544; *Maryland v. West Virginia*, supra, at 659-660, and *Indiana v. Kentucky*, supra, at 336.

## B.

### THE ACQUIESCENCE OF THE STATE OF LOUISIANA

The other set of criteria adopted by the United States Supreme Court deals with a state's failure to assert any definite claim of right to the land in dispute or the failure of the state to claim jurisdiction over the lands. All of the cases cited above clearly make these criteria of utmost importance. Louisiana offered absolutely no proof to establish any claim to the property. The state of Louisiana and the Lake Providence Port Commission did not claim Stack Island until 1987, after the Plaintiffs filed their suit to quiet title. See Exhibits P-82, P-91, P-98, P-112 and Exhibits LA-37-A.3 and LA-37-A.1, and pages 4 through 6, supra.

The Plaintiffs and the State of Mississippi made sufficient proof on each of the criteria in order to prove the acts of dominion, control and sovereignty over Stack Island. Louisiana offered no proof of the United States land survey township plats, no proof of United States patents locating the property in Louisiana, no proof of the assessment and payment of taxes, no proof of its courts assuming jurisdiction over the lands, no proof of grants by the State of Louisiana to individuals, and no proof concerning the effect of the ruling upon the rights of private parties. By failing to offer any of this proof, the State of Louisiana has unquestionably failed to show that it has asserted any definite claim of right to the land in dispute and has failed to claim jurisdiction over the lands.

## C.

THE PANEL MADE OBVIOUS ERRORS IN ITS FINDINGS CONCERNING TAXES

1. Contrary to the statement of the court at page 5134 of the decision that "there was some evidence that Mississippi assessed taxes against those individuals, although it is disputed whether the property taxes was Stack Island or the accreted lands," (also reference footnote 2 on page 5129), there is no dispute in the record that Stack Island was taxed by Mississippi since 1889. The first instance of the name "Stack Island" being attributed on a Corps of Engineers map to lands other than the lands in dispute is on a map dated in 1983, almost 100 years after the commencement of taxation of the island by Mississippi. See Exhibit LA-31-A. The Court obviously relied on misleading and erroneous information contained in the Louisiana Reply Brief at page 16 thereof.

2. Contrary to the statement of the Court at page 5135 of the decision that "there is some evidence that both states claimed the disputed lands as a tax base", there is no proof in the record that Louisiana claimed Stack Island as a tax base. The only proof offered by Louisiana concerning taxes was limited to the Louisiana mainland to the high bank. See pages 827 through 832 of the Transcript and Exhibit LA-37. There is no question that Mississippi is the only state that assessed taxes against Stack Island. The Court was clearly in error in making this statement. The Court obviously relied upon blatantly erroneous information in the Reply Brief of the State of Louisiana at page 16 thereof.

## IV.

## CONCLUSION

This Court was not justified in its decision that the district court committed clear error in its factual findings. To the contrary, the Judgments of the district court were based upon solid findings of fact and proper application of the law set out in *Missouri v. Kentucky*, supra, and under the Doctrine of Acquiescence. The Judgments of the district court should not be disturbed.

Respectfully submitted,

JULIA DONELSON HOUSTON, ET AL

BY: /s/ Robert R. Bailess

Robert R. Bailess

Attorney for Plaintiffs/Appellees

STATE OF MISSISSIPPI

MIKE MOORE, ATTORNEY GENERAL

BY: /s/ Robert E. Sanders

Robert E. Sanders

Assistant Attorney General



CERTIFICATE OF SERVICE

I, Robert R. Bailess, attorney of record for the Plaintiffs/Appellees, hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to the following:

Gary L. Keyser, Esq.  
Assistant Attorney General  
State of Louisiana  
Post Office Box 94095  
Baton Rouge, LA 70804-9095

THIS 17th day of September, 1991.

/s/ Robert R. Bailess  
ROBERT R. BAILESS

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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NO. 90-1031

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JULIA DONELSON HOUSTON, ET AL

*Plaintiff-Appellees*

*versus*

RUTH M. THOMAS, ET AL

*Defendants*

---

ON APPEAL FROM THE  
UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
WESTERN DIVISION, NO. 86-0080(B)

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REPLY BRIEF OF STATE OF LOUISIANA AND  
LIKE PROVIDENCE PORT COMMISSION,  
INTERVENORS-APPELLANTS

---

WILLIAM J. GUSTE, JR.  
Attorney General  
State of Louisiana  
State Capitol  
Baton Rouge, Louisiana 70804

GARY L. KEYSER  
Assistant Attorney General  
Post Office Box 94095  
Baton Rouge, Louisiana 70804-9095



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INTRODUCTION

Plaintiff-Appellees (hereinafter "plaintiffs") detail four principal issues before the court in their statement of issues. Issues 1, 3 and 4, as stated by plaintiffs, will be taken up first in the argument below in that they all relate to Island No. 94, it's enlargement and migration to the south and west, it's eventual disappearance, migration of the river to the west and it's return back to the east, and the appearance of the "new Stack Island" in the same geographic location as original Island No. 94.

Issue No. 2, the question of whether Louisiana acquiesced in the exercise of jurisdiction, sovereignty and possession by Mississippi and by plaintiffs will be taken up as the second item of argument.

At the outset, the attention of the Court is drawn to the fact that while Appellee's brief plows over many of the exhibits offered, no where does it cite clear-cut testimony of any witness setting forth specific facts which would describe the avulsions plaintiffs claim had the effect of fixing a boundary along the Louisiana levee, instead of midstream along the downstream track of navigation where it belongs. The brief of plaintiffs is mere unsupported advocacy filled with technical facts which do not support the claim. There are no exhibits which show the river cutting through its banks and creating a new bed, leaving an old channel and bed between abandoned banks.

It should also be noted that while not so stated, plaintiff's are claiming that *two* avulsions occurred in the Mississippi River in the vicinity of Lake Providence, and they failed to prove at trial that either occurred. The Lake Providence Reach of the river is straight in its alignment, making an avulsion extremely unlikely without the intervention of man-made works, such as the 1881-1882 Mississippi River Commission dike project which Louisiana clearly established;

Following is a description of the two avulsions claimed by plaintiffs:

- (1) The enlargement of the east chute channel at Stack Island to the North between 1908 and 1913 is one claimed avulsion; and

- (2) The second avulsion is claimed to have occurred on the westerly shore below Lake Providence between the years 1913 and 1954, as set forth in paragraphs 56 through 58 of the Complaint To Remove Cloud.

Proof of both claimed avulsions is necessary to support the boundary claimed by plaintiffs. Louisiana has clearly refuted the claimed avulsions and shown the proposed boundary to be in error. It should also be noted that there is no logical way of connecting plaintiffs claimed avulsions which would have occurred on opposite sides of the river.

#### ARGUMENT ON PLAINTIFF'S ISSUES 1, 3 & 4

In the original brief of the State of Louisiana and Lake Providence Port Commission, it was pointed out that there are currently two areas in the vicinity of this dispute known as "Stack Island":

- (1) The accretion to the west bank of the river at Lake Providence has sometimes been referred to as the "the island" or "Stack Island", as it appears to be an island at extremely high water; and
- (2) The "new" island which had developed at the precise geographic location of original Island No. 94 is known as "Stack Island".  
(Pages 5 & 6, original brief)

As to item (1) above, the District Court correctly found in it's bench opinion of June 23, 1989 that the land mass accreted to the Louisiana shore is "for large portions of the year completely dry between what is called the island and the high bank on the Louisiana side",

making it a part of the bank.<sup>1</sup> As can be seen from the map exhibit, Item 1, found in the Appendix at the end of this brief<sup>2</sup>, there can be no doubt that there has been enormous accretion to the Louisiana Bank at Lake Providence and that draftsmen have sometimes referred to the new land as "Stack Island". This is also shown on the series of flood control and navigation maps of the Mississippi River Commission offered by Louisiana as LA-26, LA-27, LA-27A, LA-27B, LA-29 and LA-31. This accretion is clearly *not* the original Island No. 94.

As to Item (2) above, it is also beyond any doubt or question that there is a "new" island in the same geographic location as the original Island No. 94.<sup>2</sup> This is the "Stack Island" for which the plaintiff's have been paying taxes for many years, as shown by the various tax assessment and payment exhibits included in globo in P-64. A portion of P-64, the certificate of the Chancery Clerk of Issaquena County, Mississippi, included as Item 2 in the Appendix at the end of this brief along with two tax notices, shows that the taxes paid by plaintiffs are on the Stack Island located in Section 27, Township 11 North, Range 9 West, located adjacent to Mississippi on the east bank.

<sup>1</sup> Under Article 456 of the Louisiana Civil Code, the bank of a navigable river is the land lying between the ordinary low and ordinary high stage of water, and is owned by the private riparian, subject to public use.

<sup>2</sup> 1988 Flood Control and Navigation Map, Mississippi River Commission

Thus, Island No. 94 surveyed in 1881 was located geographically in Section 27, T11N, R9W of the Choctaw Land District, at least as located by the surveyor at that time; the "new Stack Island" is located in the same section, township and range, although larger and having a more northerly bearing<sup>2</sup>; and the accretion against the west bank of the river at Lake Providence is located in a different township, range and land district, being Township 21 North, Range 13 East of the *Red River Land District*. As argued in the original brief filed by Louisiana (page 15), even the plaintiff's expert, Austin Smith generally admitted by locating their features on plaintiff's maps (P-1 and P-2) that the "new Stack Island" and the accretion to the west bank are in *different* locations and *different* land districts. Item 1 in the Appendix to this brief, shows the precise location of the 1881 Island No. 94 overlaid on the "new" island in the same location, as do Louisiana's other exhibits listed above, which also include low water accretions to Island No. 94.

As pointed out at trial and in Louisiana's original brief, the avulsive displacement of the river from the east chute channel in 1882 by the dike works of the Mississippi River Commission had the effect of freezing the boundary *east* of Island No. 94, six (6) years prior to the issuance of the federal patent. Austin Smith claims that this occurred in 1884 because of a flood, as shown at pages 8 and 9 of this brief. Nonetheless, the avulsive abandonment of the east chute channel was complete some years before the patent erroneously located the island in Mississippi.

Consequently, the State of Louisiana and the Lake Providence Port Commission characterize plaintiffs case



as a classic land grab action filed against numerous Louisiana individuals and not against the State of Louisiana, the Lake Providence Port Commission or the Fifth Louisiana Levee Board, who were forced to intervene. As shown by the testimony and evidence, only the Louisiana riparians have paid property taxes to Louisiana on the property on the west bank and the accretions to their property on the west bank, and they have used the newly formed land as their own over a period of many years, since its earliest formation. See LA-37, offered by stipulation in lieu of LA-38 through LA-50; R.827-832; Appellant's original brief, pages 29-33. It is clear from the ownership information shown on the Tobin Map, LA-37, together with the stipulation, that the Mississippi plaintiffs never owned or paid taxes on the defendant's land or accretions on the Louisiana side of the river. From the testimony of the state and federal witnesses called by Louisiana, Mississippi people such as the plaintiffs had never even been *seen* on the Louisiana side, much less exercised jurisdiction over the Louisiana lands as claimed by plaintiff's few witnesses ("Horsefly" Higgins, "Jelly" Higgins, James Kelly).

#### Plaintiff's Legal Theory -

In the complaint filed by the plaintiffs in the U.S. District Court, styled a "Complaint To Remove Cloud", plaintiffs set forth the facts which they claim support their legal theory of ownership of the accretion attached to the west bank of the river at Lake Providence. This complaint is made a part of Louisiana's Motion to File Complaint with the U.S. Supreme Court, found as Item A

in the Appendix included in the original brief filed herein by Louisiana and the Lake Providence Port Commission.

Commencing at paragraph 55 of the Complaint to [sic] Remove Cloud, plaintiffs set forth the underlying facts which they rely upon, tailoring the facts and misstating them to fit within applicable legal principles which would be controlling where a true avulsion has taken place on a river such as the Mississippi.

Because plaintiffs have set forth the factual elements of their claim in paragraphs 55 through 58, they will be repeated verbatim here to show how an effort has been made to create an avulsion where none existed in order to make out a case for a frozen thalweg so that a favorable boundary can be drawn for plaintiffs *along the Louisiana levee*. Following are those factual allegations:

55. Plaintiffs alleged that the said Stack Island, Mississippi, was subject to the divided flows of the Mississippi River and to the natural erosion and accretion processes of this dynamic alluvial river, and was gradually, progressively and imperceptibly enlarged southward and westward until it reached its present location. Further, from the time of its formation, the Island and its accretions have been bounded on the West by the Mississippi River channel thalweg-Interstate boundary (Mississippi-Louisiana), and bounded on the East by the chute channel, which has a bed that lies entirely within Mississippi.

56. Plaintiffs also allege that after about 1908, the river gradually enlarged the bounding chute channel on the East. Further, in about the year



1913, the enlarging Mississippi chute channel was adopted for navigation.

57. Plaintiffs allege that after about the year 1925, the bounding Mississippi chute channel continued to enlarge the flows increased therein with corresponding lessening of flows in the Mississippi-Louisiana bounding channel on the West. Further, by about 1934, divided flow conditions were favorable for the formation of accretions to the foot of Stack Island and for the river to gradually and finally abandon the old Mississippi-Louisiana channel West of Stack Island. By the year 1954, this old abandoned channel had become attenuated and filled by alluvium (silt and sand). Likewise, by the year 1962, the old channel along Hagaman Revetment in Lake Providence Bend became attenuated and filled by aluvium.

58. Plaintiffs also allege that the enlargement of the former East chute channel of the Mississippi River and the corresponding abandonment of the West bounding channel was avulsive in nature and did not operate to change the ownership of the described lands but, by reason of the said avulsive action, the Mississippi-Louisiana state boundary became firmly and finally fixed along the locus of the middle of the former main navigation channel, sometimes called the thalweg, which former channel is identical with the West boundary of the lands described and known as Stack Island as described in Paragraph 48 above.

As will be shown below, some of the facts recited are correct, some are mis-stated and some are totally incorrect. Plaintiffs rely principally on the decision of the 8th

Circuit Court of Appeals in *Davis v. Anderson-Tully Company*, 252 F. 681 (8th Cir. 1918), found at pages 17 and 18 of their Appellate brief and attempt to tailor the facts of this case to fit the principles set forth in *Davis*.

The facts in that case were substantially different than the facts in the case now before the court, in that in *Davis*, there was a true avulsion and the main channel of navigation of the Mississippi River changed its course by the sudden and violent process of avulsion, abandoning its former bed around a bend and establishing a *new* channel in a *new* bed contained by *new* banks, although the former channel remained navigable for at least ten (10) years thereafter. (At 252 F. 684) The language of the case describes the river cutting a new course across land "not by creeping", but by "jumping over" and "making or adopting a new course". (At 252 F. 685)

In the present case, the Mississippi River in the vicinity of Lake Providence has never left it's banks; it has never formed a new channel in a new bed, and has never abandoned a former channel. The river flow divided around the original Island No. 94, and the main channel of navigation has shifted back and forth from the east to the west over the years, with both channels continuously in existence. That is, the downstream track of navigation has sometimes been in the east channel, sometimes the west channel, and moving back and forth over time. The river has always remained in its banks and never cut through them, forming a new channel.

As correctly stated by the plaintiffs in paragraph 55, the original Island No. 94 "was subject to the divided flows of the Mississippi River and to the natural erosion

and accretion processes of this dynamic alluvial river, and was gradually, progressively and imperceptibly enlarged southward and westward \* \* \* ". This does not describe an avulsion.

The language of the complaint goes on to state that "until it reached its present location." This is incorrect, as the map exhibits show that while Island No. 94, the original Stack Island, did gradually, progressively and imperceptibly enlarge southward and westward, it was eventually washed away. Simultaneous with the enlargement of the island to the south and the west, the river scoured into the west bank at Lake Providence as the river itself moved westerly. Around 1930, the river began moving back to the east, depositing substantial alluvion from upstream against the west bank of the river at Lake Providence, filling in the eroded area.

It is this accreted land mass which plaintiffs would like to add to their ownership of lands in the vicinity, including the new Stack Island now in place in the same geographic vicinity as the original Island No. 94. Plaintiffs state at page 2 of their appellate brief, in part, that "there is and was no issue in the District Court concerning any islands presently located near the east bank of the Mississippi River". However, as pointed out above, the tax payment proof offered by plaintiffs relates to the new island near the east bank, not the accretion to the west bank. See Appendix Item 1.

As plaintiffs state at page 25 of their appellate brief, the Fifth Circuit has already given a favorable judgment on "the property in question", as against the riparian owner in Mississippi. Louisiana was not brought into that

case, either, nor were the issues the same. Consequently, if the lower court judgment in this case is upheld, plaintiff will have won the new Stack Island on the east bank, the accreted lands on the west bank, and a boundary along the Louisiana levee.

Plaintiffs correctly state in paragraph 56 of the original complaint "that after about 1908, the river gradually enlarged the bounding chute channel on the east." This is shown by LA-16 and LA-16A, which prove that by the year 1909, the downstream track of navigation was once again in the chute channel east of the original Stack Island, but the river continued to be divided around Stack Island and in no way cut through it's natural banks or abandoned its bed. The enlargement of the east chute channel simply led to navigation adopting this course as the downstream track of navigation, being the safer course due to unpredictable shoaling and sand bars which developed to the west of Stack Island.

Although the plaintiff's expert, Austin Smith, claims an avulsion occurred during what he calls a major flood of 1912-1913, he admitted that "the flow was pretty well divided at that particular time on the east side and on the west side" of Stack Island. (R. 334) There was likely an enlargement of the east channel at this time, but no avulsion could have occurred and there are no known facts to suggest or support such a dramatic change in the river. He further testified that "conditions were favorable for the island to go downstream", clearly meaning that the island is facing significant flow from the north and is going to migrate. Later, of course, it was totally washed away from its 1881 location and subsequently disappeared.

Austin Smith's strongest testimony in which he attempts to characterize river changes as avulsive in nature is found in the record at page 334 and 338. His testimony is less than convincing. At page 334, he states as follows:

A. No, sir. The major flood of 1912 and 1913 apparently enlarged the chute channel and this was adopted by navigation. That adoption is avulsive in nature and it leaves the Mississippi-Louisiana thalweg boundary on the west channel. (Emphasis ours)

To state that an "apparent" enlargement of the east chute channel is an avulsion is patently ridiculous, especially since Austin Smith had testified just a moment earlier that "the flow was pretty well divided at that particular time on the east side and on the west side." (R.334) Consequently, plaintiff's effort to support the claim made in paragraph 58 of the complaint, stated above, fails miserably, for the only person called by the plaintiffs to testify on this point is saying that an equally divided flow around the island, with an "apparent" enlargement of the east chute channel resulted in an avulsion. This makes no sense and is contrary to applicable principles of law, which call for the thalweg boundary to move with the downstream track of navigation in an ambulatory river such as the Mississippi. A thalweg boundary is not frozen except by statute, treaty or a true avulsion.

Later in his testimony, at page 338, Austin Smith testified that:

A. Well, I'm not a "jump over" witness. The thalweg boundary thalweg stayed on the west

side of Stack island. The floods in 1912 and 1913 enlarged the chute channel to the east of Stack Island. And it was of an avulsive nature, that enlargement was. And it was adopted by navigation. And the boundary thalweg remained on the west side of Stack Island under those conditions. This has happened in other places.

Q. Repeat that, Mr. Smith, please.

A. Such action of enlarging the chute channel, of an island is called avulsing, leaving the boundary channel on the other side of the island unaffected.

Again, quite ridiculously, Austin Smith is contending that the enlargement of the chute channel is an avulsion, without describing any other factual occurrence in support of this claim. The plaintiffs never identified the purported location of the avulsion; never described the river moving from its banks or cutting a new bed; never described any actual abandonment of a former river bed; but only the gradual enlargement of the chute channel, with the flow of the river roughly divided between the east chute channel and the west channel.

It should also be noted that in a further effort to follow the language of *Davis v. Anderson-Tully, Company*, page 7, *supra*, counsel for the plaintiffs asks Austin Smith on several occasions to describe the river "creeping over" or "jumping over" Stack Island. This language is borrowed from page 685 of the decision. (252 F. 681, at 685)

Austin Smith candidly admitted that he was not a "jump over" witness (R. 338), and was not willing to attempt to describe exact details of some river action that might be the basis for a true avulsion, since there was no



documentary support for such testimony. Moreover, his only evidence of anything to support a claim of a flood in this region of the river during 1912 or 1913 comes from P-18, a hydrographic map introduced by Austin Smith. It clearly shows that no avulsion took place: (1) no former channel was abandoned (2) no banks were cut (3) no new bed, channel or banks were created.

Even assuming a flood, it cannot be seriously contended that the gradual shift of the course of navigation from one channel around an island to another channel is the equivalent of or supports a claim that an avulsion occurred, where the channels are roughly equal and exist simultaneously. This might be so if a gradual change in the downstream course of navigation was the equal of an avulsion, but such is simply not an applicable principle of law.

If Austin Smith's contention were true, there would be frozen interstate boundary thalwegs at *every* island location in the river where the course of navigation moved from one side of an island to the other over time. This is simply not correct and can be determined by a review of U.S. Geological Survey Quadrangle Maps, for instance, showing the boundaries between states following the course of navigation, except where there has been avulsive cut-offs of bends of the river. The result is generally a "false river", being a former loop of the river sealed up at its ends. The dynamics of this type of occurrence are shown in the Appendix to this brief, Items 3 and 4.

Paragraph 57 of the complaint alleges that after about 1925, the bounding Mississippi chute channel continued to enlarge with a corresponding lessening of flows in the

bounding channel on the west. In fact, as will be seen from the various map exhibits, such as LA-18, LA-18, LA-19 and LA-21, and as stated on page 8 above, the river had scoured into the west bank at Lake Providence as it moved slowly westerly. Around 1930, the entire river began moving back to the east, still within its banks, depositing substantial alluvion against the west bank adjacent to Lake Providence and below.

Paragraph 57 of plaintiff's complaint is worded to suggest that there was an "old abandoned channel", but in fact, as the river moved it simply deposited alluvion in the location where water had run previously. There was never an abandonment of a channel with distinct banks, only the gradual movement of the river to the west, refilling the area with alluvion which it had scoured between 1915 and 1930. Here, the effort of the plaintiffs is to try and "create" an abandoned river bed where none existed. The alluvion deposited against the west bank at and below Lake Providence is evident from reviewing any map 1925 or later used in this case. For instance, the map exhibit, Item 1, found in the Appendix of this brief clearly shows the accretion left in the wake of the easterly migrating river. The accretion re-built the eroded sections of Louisiana land caused by the earlier migration of the river to the west.

What the plaintiffs are trying to suggest is that there is an "old abandoned channel" west of the accretion at Lake Providence. Again, plaintiffs used the language of relevant cases and tried to demonstrate that the changes which occurred in this reach of the river are avulsive in nature, but the so-called old abandoned channel is nothing more than the accreted and filled in westerly edge of



the former course of the river against the west bank. No channel of the river with distinct east and west banks was cut off, abandoned and filled by alluvion, it is simply the westerly edge of the former river course, the easterly edge of which is on the east bank of the river. The river at no time cut through its banks or the levees or abandoned an old bed of the river. No where in his testimony does Austin Smith describe any phenomenon like or approximating an avulsion or the abandonment of a former reach of the river.

As will be seen from the map in the Appendix at the end of this brief, as well as numerous other exhibits, such as LA-30, and LA-32D contained in the appendix filed in a separate volume with this reply brief, the river simply migrated gradually to the east, leaving accretion to the westerly bank. In questioning plaintiff's witness, Austin Smith, counsel for the plaintiffs always refers to "the abandoned channel west of Stack Island", as if such a abandoned channel actually existed. Austin Smith responds by testifying that the "flow has been closed off", all in an effort to suggest that there was in fact some cutoff loop of the river in the area near Lake Providence, but this clearly never occurred. (R.395-397) Again, counsel for plaintiff is attempting to utilize the language from *Davis v. Anderson-Tully Company*, page 7, supra, to suggest an avulsion and resulting abandonment of a course of the river. Parenthetically, this never occurred and Austin Smith was never able to describe a precise location for the claimed avulsion; a precise location where the banks of the river had been severed; a precise location where a new river bed had been scoured through land; or where new banks might have been created. At all times, the

river has been contained between its eastern bank and its western bank, although the banks have been scoured away and added to as a river undulated slowly back and forth over the last one hundred fifty (150) years pertinent to this case.

As to the location of Island No. 94 at the time of the patent in 1888, it should have properly been located in Louisiana, but because the original survey of 1881 failed to take account of the fact that the east chute channel was the downstream track of navigation at the time, the surveyor erroneously located the island in Mississippi. Later, the patent was issued based upon the 1881 survey, although the dike works of the Mississippi River Commission had, following the dike project in 1881 to 1882, closed off the east chute channel, throwing the downstream track of navigation west of the island. These facts were not understood at the time of patent, although as a practical matter the only difference this makes is that Mississippi has gained some ad valorem taxes attributable to the original location of Stack Island over the years. Intervenor's do not claim ownership of the island now located at the same geographic coordinates as the original island, and it continues to be taxed by Mississippi. The accretion to the west bank claimed by plaintiffs is entirely different land which formed commencing in the late 1920's, 1930's and later.

As shown in Appellant's original brief at pages 12-14, 17-23, the annual report of the Mississippi River Commission for the years 1881 and 1883, LA-18A, show the details of the Mississippi River Commission project to construct dikes and force the main channel of the river from its location in Stack Island Chute (east), along the

outside of the island to the west. About this, there can be no doubt, even though the trial judge chose to ignore these reports after questioning Louisiana's experts about their meaning, which is rather plain.

It should be noted that plaintiffs expert, Austin Smith, admitted having knowledge of the Mississippi River Commission dike construction project and that the selection of the west channel for the main flow of the river was the purpose of the project, although he refused to admit that the downstream course of navigation was in the east chute channel at the time it was closed off (R. 417-440). Austin Smith agrees that the east chute channel had been totally closed by 1894, although attempting to attribute it to floods rather than the Mississippi River Commission dike construction project. Nonetheless, the east chute channel was closed, whether by virtue of the dike project or the floods and, consequently, because of the sudden, immediate and avulsive nature of the closure, the boundary would have been frozen east of the island, thereby throwing the island into Louisiana territory, contrary to the surveyors map of 1881, which was made prior to the avulsion of 1882 (1884 as claimed by Smith). Later, in 1888, the patent was based on the 1881 survey, but without reference to the avulsion.

All of this supports Louisiana's position that at the time of patent, the island was actually within Louisiana territory and the patent erroneously showed it to be in Mississippi.

## ARGUMENT ON PLAINTIFFS ISSUE 2

Louisiana's argument on the question of acquiescence and possession of "Stack Island" is contained in appellants original brief herein, pages 29-33.

It is interesting to note that while plaintiffs rely upon their Exhibit P-64 (Appendix Item 2), containing a certificate of the Chancery Clerk of Issaquena County regarding taxes, the taxes paid were not on the accretion to the west bank of the river at Lake Providence, which seems to be the object of this suit, but rather on the geographic location of the original Island No. 94, as shown on pages 3 and 4 of this reply brief. The documents from P-64, show the geographic location of the taxed land being in Section 27, T11N, R9W. Consequently, the plaintiffs have never paid taxes on the land which accreted to the Louisiana shore.

Plaintiffs also argue at page 12 of their appellate brief that Louisiana never offered any evidence regarding the assessment of taxes by Louisiana on "Stack Island". Actually, counsel for the plaintiffs stipulated to LA-37, a Tobin Map showing that the riparian lands on the west bank of the river are owned by Louisiana residents. It was stipulated that the Louisiana riparians paid property taxes on both the riparian property and the accretions to it, and that the Mississippi plaintiffs never owned or paid taxes on this land on the west bank nor, as some of the Louisiana witnesses testified, had Mississippi people ever been seen on the west bank of the river. (R. 827-832; *supra*, pages 3-4)

Louisiana and the Lake Providence Port Commission offered numerous witnesses on the question of acquiescence and possession, most of which is contained in volume 10 of the record, pages 869 through 942. These witnesses include long time residents and riparian property owners from the west bank, Elizabeth D. Reed and Mrs. Vail Deloney, whose property has been in the Deloney family since before the turn of the century; a U.S. Fish and Wildlife Service Employee, Joseph A. Oliveros; Louisiana Department of Wildlife and Fisheries agents, Michael Murray and Joe Chatman; and other local residents who have hunted on the accreted area for nearly fifty years without having seen any Mississippi people whatsoever (Billy Jack Murray).

It is clear from the testimony of all of these witnesses for Louisiana that they consider the accreted land on the west bank to belong to Louisiana riparians and to be located within the territory of Louisiana. For instance, U.S. Fish and Wildlife Service Agent Joe Oliveros testified that all game violation cases that he knew of in this, his area of jurisdiction, went to court in Louisiana. The same was true for the Louisiana Department of Wildlife and Fisheries agent, who regularly patrolled the "island", being the accreted area attached to the Louisiana bank, writing game violations and prosecuting them in Louisiana courts. It is equally clear that the property owners did not consider the accretions to be in Mississippi, as they were paying taxes on the land in Louisiana (LA-37 and stipulation).

It is submitted that the Trial Court should have found that neither the State of Louisiana, nor the Lake Providence Port Commission, nor Louisiana citizens knew of,

or acquiesced in, any purported dominion of Mississippi residents or the State of Mississippi over the disputed territory attached to the west bank of the river at Lake Providence. It should also be noted that Charles Shelton (R. 84-110), a witness for the plaintiffs, testified that some of the accretion was clearly believed to be in Louisiana; that East Carroll Parish Sheriff Sam House not only claimed the accretion as his own but placed a fence around it and did not let anyone trespass on the accretion to his land.

It is submitted that the accretions to the west bank were possessed by, use by and enjoyed by the Louisiana residents, who paid taxes on the accretion. There has never been acquiescence or adverse possession by Mississippi residents and, particularly, not those who testified for the plaintiffs. The rule of law which should be applied is as found in *State of Louisiana v. State of Mississippi*, 282 U.S. 458, 75 L.Ed. 459, 51 S.Ct. 197, at 201 (1931). The claims of the plaintiffs should be rejected.

#### PLAINTIFFS HAVE FAILED TO CARRY THE BURDEN OF PROOF

The plaintiffs in this case must carry the burden of proving that the claimed boundary along the Louisiana bank from above to below Lake Providence, Louisiana, is a true and correct boundary. In paragraph 52 of plaintiffs Complaint To Remove Cloud, plaintiffs describe an exact boundary by latitude and longitude, claiming that there was an abandonment of the west channel which was



avulsive in nature and had the effect of fixing the boundary in the location of a claimed former thalweg (paragraph 58).

As pointed out on page 7 above, plaintiffs rely principally on the holding in *Davis v. Anderson-Tully Company* for language which they assert fits the facts of this case. In *Davis*, there was a true avulsion where the Mississippi changed its course, abandoning a former bed around a bend and establishing a *new* channel in a *new* bed contained by *new* banks.

In the case now before the court, there were no such changes and the plaintiffs could not show any. The testimony of the plaintiff's expert, Austin Smith, detailed no specifics and only generally followed what was alleged in paragraphs 55 to 58 of the Complaint To Remove Cloud. He described in most general terms what he considered to be an avulsion of the river, consisting of an "apparent" enlargement to the east chute channel, which is clearly *not* an avulsion. See pages 9-11, *supra*.

As this court held in *Shapleigh v. United Farms Company*, 100 F.2d 287 (1938), one asserting the location of a boundary line assumes the burden of proving that fact and a judgment cannot rest upon a mere guess or conjecture as to how and why a boundary may be so located. See also *State of Oklahoma v. State of Texas*, 260 U.S. 606, 67 L.Ed. 428, 43 S. Ct. 221 (1923); *State of Kansas v. State of Missouri* 322 U.S. 213, 88 L.Ed. 1234, 64 S.Ct. 975 (1944).

It is clear from the plaintiffs own exhibits that they cannot make out a case for a frozen boundary because the Mississippi has never left or cut through its banks, carving a new channel. For instance, one of plaintiff's main

exhibits is P-18, a 1913-15 Mississippi River Commission map which clearly shows that levees have been in place on both the east and west banks of the river at all pertinent periods of time. There are levee set backs shown, which show that the river has periodically scoured into each bank, but *never breached its banks*. The flow of the river is simply divided around island formations in the river, such as Stack Island, and no portion of the river channel anywhere in the vicinity of this dispute has been cut off or abandoned.

What has occurred is that the downstream track of navigation has shifted gradually from one side of island formations in the river to the other, allowing downstream navigation to follow the safer, shorter or swiftest course from time to time. Plaintiffs can make out no case for an avulsion, especially not by claiming a gradual abandonment of the channel between 1913 and 1954, as particularized in paragraphs 56, 57 and 58 of the Complaint To Remove Cloud. Clearly, no channel of the river was ever abandoned.

The accretion to the west bank of the Mississippi River at and below Lake Providence is very similar to the accretions which attached to the Louisiana shore at Albermarle Bend in *State of Louisiana v. State of Mississippi* 282 U.S. 458, 75 L.Ed. 459, 51 S.Ct. 197 (1931), wherein as the Mississippi River moved easterly, it ate away all of Tullos Island and large portions of the Mississippi shore. According to applicable rules of law, the interstate boundary line moved with the river as it gradually and imperceptibly moved easterly and northwardly some five or six miles. The accretions forming on the west bank became the territory of Louisiana, even though in

1912-1913, the river suddenly changed its course and cut across the bar formed by the accretions on the Louisiana side. By this avulsion, the river formed a new channel to the west, severing from the Louisiana shore a large portion of the accretion which had formed as the river moved easterly. Because the change was by avulsion, the boundary line remained fixed at the extreme easterly channel of the river as it was in 1912-1913.

In the case now before the court, as in the case cited, the evidence clearly shows that the accretion to the Louisiana shore was extended gradually and imperceptibly as the river moved easterly from around 1930 on, although no avulsion ever took place severing the accreted lands from Louisiana.

Also included for illustrative purposes in the Appendix at the end of this brief, are two exhibits showing typical avulsive cut offs in the Mississippi. The first, Item 3, shows the cut off loop which became False River at New Roads, Louisiana. The avulsive action of the river is obvious, showing False River Lake to be a classic cut off loop where the river cut through its banks, establishing a new bed and new banks, abandoning the old channel, bed and banks.

The fourth illustrative exhibit, Item 4, comes from *State of Louisiana v. State of Mississippi*, 283 U.S. 791, 75 L.Ed. 1417, 51 S.Ct. 369 (1931), showing another classic cut off loop in the river at Willow Point in the vicinity of the boundary between East Carroll Parish, Louisiana and Issaquena County, Mississippi. As held by the U.S. Supreme Court, the avulsive cut off led to a freezing of the boundary in the former thalweg of the cut off loop, as

shown on the map. No such cut off occurred in the case now before the court; hence, no avulsion could have occurred.

It is submitted that plaintiffs, conversant with these cases and knowing that there had been avulsive acts in the period 1912-13 in both earlier cases heard by the U.S. Supreme Court, selected that date in the instant case for the year that it is claimed the east chute channel enlarged. As noted above at page 2, there are in effect two claimed avulsions:

- (1) The enlargement of the east chute channel at Stack Island to the North between 1908 and 1913 is one claimed avulsion; and
- (2) The second avulsion is claimed to have occurred on the westerly shore below Lake Providence between the years 1913 and 1954, as set forth in paragraphs 56 through 58 of the Complaint To Remove Cloud. (See page 39 of appellant's original brief)

As shown in Appellant's original brief (pages 24, 25, 34, 39, 41) plaintiffs expert, Austin Smith, chose not to use the Lake Providence Quadrangles of 1909 and 1911, introduced by Louisiana as LA-16A and LA-16, even though the exhibits were exchanged long prior to trial, as admitted by Austin Smith on a cross examination. (R. 414-418, at 415) These two exhibits clearly show that the east chute channel was already the downstream track of navigation as early as 1909, so the flood claimed to have "apparently" enlarged the east chute channel in 1912-13 came long after the thalweg had shifted. There is no evidence of any avulsive act around this time, and the downstream

track of navigation had simply shifted to the east of the island by 1908-1909.

**PLAINTIFFS EXPERT, AUSTIN SMITH, WAS NOT CREDIBLE AND HIS TESTIMONY SHOULD BE REJECTED**

Austin Smith did not use certain key exhibits in his testimony which he was aware of prior to trial and cross-examined about during trial. One of these is the Mississippi River Commission Report and map introduced as LA-18A documenting the location of the main navigation channel of the river on 11 August, 1881 as lying in Stack Island Chute east of the Island. This clearly places Island No. 94, sometimes known as Stack Island, in Louisiana territory, although the U.S. Deputy Surveyor was not aware of this information and erroneously placed the island within the territory of Mississippi. As discussed in Appellant's original brief, pages 17-20, the Mississippi River Commission construction works forced the downward track of navigation out of the east Stack Island Chute and into the west channel around 1882, the year after the survey of Island No. 94 by the U.S. Deputy Surveyor, and six years prior to the issuance of the patent on the island. This avulsive change which had the effect of forcibly evicting the navigation channel from the Stack Island Chute, had the effect of freezing the boundary east of the island, six years prior to its being patented out of the government of the United States. Austin Smith admitted having knowledge of the Mississippi River Commission dike construction project; of the exhibits offered by Louisiana; and admitted that the east chute channel had

been totally closed by 1894, four years prior to the issuance of the patent. See page 15, *supra*. Nonetheless, he inexplicably continued to insist that the track of navigation was not in the east chute channel, from which it was forcibly evicted according to the express language of the reports.

Austin Smith also failed to use the Lake Providence Quadrangles of the U.S. Geological Survey dated 1909 and 1911, introduced by Louisiana as LA-16 and LA-16A, although he was aware of these exhibits and they were exchanged long prior to trial, which he admitted on cross-examination. (See page 21, *supra*).

It is generally held that where a party fails to produce available evidence, a presumption or inference arises that such evidence or testimony would have been unfavorable to him, raising the further presumption or inference that the cause of action is without substantial foundation, especially where the evidence is significant to the issues. See 29 Am. Jur. 2d 175, at 220 et seq. The logical inference from plaintiffs failing to utilize LA-16, LA-16A and LA-18A is that the documents would not support the plaintiffs assertions and would have been unfavorable to their position. See *Kirby v. Tallmadge*, 160 U.S. 379, at 382, 40 L.Ed. 463, 16 S.Ct. 349 (1896); *Runkle v. Burnham*, 153 U.S. 216, 38 L.Ed. 694, 14 S.Ct. 837 (1894); Additional citations at 29 Am. Jur. 2d 178, page 222.

As further argued at page 11 of Appellant's original brief, Austin Smith is not a credible witness and his testimony has previously been rejected by the U.S. Supreme Court in another boundary case between the two states, *State of Louisiana v. State of Mississippi*, 466 U.S.



96, at 104, 80 L.Ed. 2d 74, 104 S.Ct. 1645 (1984). In that case, the Special Master found "no evidence in the record" to support Austin Smith's placement of the boundary. The U.S. Supreme Court recited the Master's findings rejecting Mr. Smith's purported line and upheld these findings in every respect, at pages 105 and 106.

In this case, as in the previous case, no weight should be attached to Mr. Smith's opinion, especially since he cannot support it with documentary evidence and because it flies in the face of evidence submitted by Louisiana.

While it is the Federal Rule that due regard should be given to the trial court to judge the credibility of witnesses, where testimony is not credible and not based upon facts and documents placed in evidence, the "clearly erroneous" rule should apply and the judgments of the trial court should be set aside. See *Graver Tank v. Linde Air Products Company*, 69 S.Ct. 535, 93 L.Ed. 672, 336 U.S. 271 (1949).

### CONCLUSION

It is submitted that there is no evidence to support Austin Smith's contentions and interpretations, and the trial court finding is erroneous. It is the established jurisprudence under Rule 52(a) of the Federal Rules of Civil Procedure that a finding is "clearly erroneous", as here, when the reviewing court on the entire record and evidence before it is left with a definite and firm conviction that error has been committed. See *United States v. United States Gypsum Company*, 333 U.S. 364 at 395, 92 L.Ed. 746, 68 S.Ct. 525 at 542 (1948); *W.S. Shamban & Company v.*

*Commerce and Industry Insurance Company*, 475 F.2d 34 (1973). The trial court ruling should be reversed. (See also, page 35 of Appellant's original brief.)

Respectfully submitted,  
WILLIAM J. GUSTE, JR.  
Attorney General

By: /s/ Gary L. Keyser  
GARY L. KEYSER, Chief  
Lands and Natural Resources  
Division  
Post Office Box 94095  
Baton Rouge, Louisiana  
70804-9095  
(504) 342-7900

### CERTIFICATE

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record, postage prepaid, this 10th day of October, 1990.

/s/ Gary L. Keyser  
GARY L. KEYSER

### APPENDIX

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|-------------|--|
| <u>Item</u> |  |
| 1.          | 1988 Flood Control and Navigation Map, Mississippi River Commission                                |
| 2.          | P-64 (portion) - Certificate of Chancery Clerk, Issaquena County, Mississippi, and tax notices (2) |

3. The neck cutoff oxbow Lake Cycle along the lower Mississippi River, Sherwood M. Gagliano and Perry C. Howard, October 24-26, 1983. Figure 3 shows geomorphic elements of False River, Louisiana
  4. Map of the boundary line between Louisiana and Mississippi in *State of Louisiana v. State of Mississippi*, No. 6 Original, Supreme Court of the United States, 283 U.S. 791, 75 L.Ed. 1417, 51 S.Ct. 369 (1931)
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